No. 191

FILED
JUN 22 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

DIE AND TOOLMAKERS LODGE 113
INTERNATIONAL ASSOCIATION OF MACHINISTS
(AFL-CIO), *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on May 9, 1956.

OPINIONS BELOW

The National Labor Relations Board's opinion is reported in the Official Reports of that agency and appears at 111 NLRB 853. The United States Seventh Circuit Court of Appeals' opinion is reported at 231 F. 2d 298. (Appendix A and Appendix B, *infra.*)

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1) and 29 U.S.C. § 160 (e). (Appendix C, *infra.*) The opinion of the Court of Appeals issued on March 6, 1956. Rehearing was denied on April 19, 1956. The Court's final decree was entered May 9, 1956.

QUESTIONS PRESENTED

1. As a question of law and statutory construction, where it is undisputed that a union invoked a valid union security clause to cause an employer to discharge an employee whose union membership was automatically terminated by non-tender of dues, has any violation of Section 8(b)(2) of the Act occurred?

2. As a matter of law, are the Board's and Court's findings of fact and conclusions of law defective when there is a material variance between the complaint and the proof and part of the evidence relied upon concerns conduct pre-dating the charge by more than six months?

STATUTES INVOLVED

The statutory provisions involved are Sections 8(a)(3), 8(b)(1)(A), 8(b)(2) and 10(b)(c) and (e) of the National Labor Relations Act, as amended, (29 U.S.C. 158(a)(3), 158(b)(1)(A), 158(b)(2), 160(b)(c) and (e)) and Section 10(e) of the Administrative Procedures Act (5 U.S.C. 1009(e)).

These provisions are reproduced in Appendix C *infra.*

STATEMENT

The facts material to consideration of the questions presented in this case relate primarily to the interpre-

tation and application of Sections 8(b)(2) and 10(b) of the National Labor Relations Act, as amended.

1. It is undisputed that, pursuant to a valid[1] union-security agreement between the Petitioner and Peerless Tool and Engineering Co. (hereafter called Peerless) (R. 28), Petitioner sought and secured the discharge of Peerless employees Salisbury, Pieha and Bellendir.[2] (R. 40) It is likewise undisputed that the membership of these three employees in Petitioner Union had terminated during the term of such agreement because of their failure to tender the dues uniformly required as a condition of retaining membership.[3]

However, the Board ruled that these three employees were discharged in violation of Section 8(b)(2) of the Act because any tender of such dues, if made, would have been futile (R. 382, Appendix 5a). The Board based its ruling on a finding that the Union had a policy of not accepting dues without an accompanying donation to the Union's strike fund (R. 380, Appendix 4a).

2. In Paragraph 8(a) of the Complaint, Petitioner was charged with having violated Section 8(b)(1)(A) of the Act by F. M. Wilkie, its business representative, and Anthony Chmielak, its steward, having threatened employees that the Union would refuse to represent

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[1] The Board's General Counsel conceded the validity of the agreement under the first Proviso to Section 8(a)(3) of the Act. (R. 361, footnote 15)

[2] Two additional dischargees, Hall and Taylor, involved in the earlier stages of this proceeding, are not involved in the questions whose review is sought.

[3] The Board so conceded. (R. 379, 380; Appendix 3a)

them in processing grievances against Peerless if said employees *failed or refused to pay assessments* to the Union (R. 16).

By motion during the course of the hearing, Frank Wilkie's name was stricken (R. 81). Proof of this alleged violation was limited to such threat allegedly having occurred *after October 15, 1953 and before October 31, 1953,* because the General Counsel limited the alleged utterance of the alleged threat to June, August, September and October, 1953 (R. 24), and Section 10(b) of the Act (Appendix 25a) precluded the Board from predicating a finding of violation of the Act on utterances made more than six months prior to the April 15, 1954 issuance of the charge on which Paragraph 8(a) of the Complaint was based (R. 9-10).

The Board found that Steward Chmielak "at least during October and November, 1953" (R. 382, footnote 6; Appendix 6a), uttered the following threat: "He [Chmielak] said they [the Union] would not look into any of my grievances *unless I could show my book showing I had a paid up membership"* (R. 177) (Emphasis added).

The lower court relied on Cerminn's testimony that the Union threatened him on June 10, 1953, that it would not handle his grievances unless he paid an assessment (donation) into the Union strike fund *and* his testimony that the Union threatened him in October, 1953, that it would not handle his grievances if he wasn't a paid-up member of the Union, to establish the 8(b)(1)(A) violation charged in Paragraph 8(a) of the Complaint (Appendix 16a).

3. As to 1 above, the lower court limited its review to the question of whether the Board's 'futility' finding

was supported by substantial evidence (Appendix 13a), ignoring the legal questions in the case concerning the Board's construction and application of Section 8(b)(2) of the Act.

As to 2 above, the lower court limited its review to the question of whether the Board's finding of violation of Section 8(b)(1)(A) of the Act was supported by substantial evidence (Appendix 17a), ignoring the legal questions in the case concerning variance between the conduct alleged in the Complaint as violative of the Act and the evidence relied on as establishing the claimed violation, and the application of Section 10(b) of the Act.

The lower court denied Petitioner's timely filed Petition for Rehearing on April 19, 1956 and issued its final decree enforcing the Board's order on May 9, 1956.

REASONS FOR GRANTING THE WRIT

1. This case concerns important legal questions involving the construction and application of a federal statute affecting the orderly administration of collective bargaining agreements and the internal affairs and laws of labor organizations, which have not yet been settled by this Court.

a. Section 8(b)(2)

(1) Section 8(b)(2) of the Act (Appendix 25a) makes it an unfair labor practice for a union to cause an employer to discharge one of his employees under a Union Security Agreement of the type authorized by the first proviso of Section 8(a)(3) of the Act (Appendix 24a), where the dischargee's *union membership* was terminated on some ground other than his failure to tender the periodic dues required as a condition of retaining his membership.

It is clear under this language, *that where it is undisputed a dischargee's union membership has been terminated by his failure to tender dues,* and that his discharge is subsequently requested under a valid union-security clause for the non-membership so caused, no violation of Section 8(b)(2) occurs.

The rule is well established that a clear and unambiguous statutory provision, such as this, cannot be amended by administrative interpretation and application, to fit the notions of the Administrator of desirable policy under the Act. (*Colgate-Palmolive-Peet Co.* v. *NLRB,* 338 U.S. 355, 362-364; *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369, 370; *Koshland* v. *Helvering,* 298 U.S. 441, 447; *Addison* v. *Holly Hill Fruit Co.,* 322 U.S. 607, 617, 618; *Regents of the University System of Ga.* v. *Carroll,* 338 U.S. 586, 601-3; *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission,* 291 U.S. 587, 598.)

As this court stated in *Colgate-Palmolive-Peet Co.* v. *NLRB,* 338 U.S. 355, at 362-363:

> "The claimed impotency of the [union security] contract as a defense here rests *not upon any provision of the Act of Congress or of state law but upon a policy declared by the Board* . . . Congress knew that a closed shop would . . . lead inevitably to discrimination in tenure of employment. Nevertheless . . . Congress inserted the Proviso of 8(3) . . . That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act . . . *To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress* . . ."
> (emphasis added)

Yet what the Board has done here, with the lower court's approval, is to administratively modify or amend Section 8(b)(2) of the Act, to conform to its notions of desirable administration of union-security agreements.

As pointed out in the Statement, the Board admitted it was undisputed that the union memberships of Salisbury, Picha and Bellendir were automatically terminated in accordance with the Union's laws, by their failure to pay dues to the Union, that such termination occurred at a time they were subject to a valid Company-Union agreement conditioning their continued employment on the retention of Union membership over the life of that agreement, and that the Union's subsequent request for their discharge was specifically predicated on their non-membership due to such non-tender of dues. With those concessions, the Board had only one course of action open—dismissal of the Complaint.

But the Board, to use its own words, stated instead that: "The failure of Salisbury, Picha and Bellendir to tender dues during their respective three-month grace periods is immaterial" (R. 382; Appendix 6a). (To the question of whether Section 8(b)(2) was violated.)

This finding of the Board (and the lower court) removes the words "reasons other than" from Section 8(a)(3)(B) and the words "some ground other than" from Section 8(b)(2) of the Act (Appendix 25a). And these are the key words which give these statutory provisions meaning, which provide statutory basis for invalidation of union security agreements! By

such 'judicial amendment' the Board and lower court stretched the statute beyond any recognizable limit, by administrative construction of Section 8(b)(2), to accomplish a purpose Congress did not contemplate or authorize, namely, the invalidation of a union-security agreement where the loss of union membership resulted from non-tender of dues.

However ambitious the Board may be to avoid the impact of union security agreements on employees (for example, see *Colgate-Palmolive-Peet Co.* v. *NLRB,* 338 U.S. 355) or to otherwise alter Congressional policy set forth in the statute (cf. *NLRB* v. *Highland Park Mfg. Co.,* 341 U.S. 321), the place to address its desires to establish such policy change is Congress, not by administrative amendment of the Statute.

It is plain that the Board has sought to escape from the requirements of the clear and unambiguous language of Section 8(b)(2) of the National Labor Relations Act, as amended, by writing an exception into the section which it does not contain, or authorize, or permit. *This it cannot do except by Act of Congress.*

Prior to the changes beginning in 1953 in the composition of the Board's membership, several *former* members of the Board construed Section 8(b)(2) of the Act in accordance with its plain provisions. In the case of *Al Massera, Inc.,* 101 NLRB 837, in footnote 8 on pages 839, 840, former Board members Houston and Styles are quoted as follows:

> "Members Houston and Styles would not find a violation by these Respondent Employers, even

absent any investigation by them as to the Union's reason for requesting the discharges. *The employees were not members in good standing because of* either *nonpayment of dues* or failure to make proper application for membership. Each was thus vulnerable to discharge because of his own improper conduct. *The Act gives the Union an absolute right in these circumstances to request their discharge.* Congress intended to eliminate 'free riders' under a valid union-security provision such as existed in this case, and permitted the ultimate sanction of discharge to prevent employees from 'taking a free ride.' The Congressional Record and the various committee reports on the amendments to the Act are replete with references that emphasize a man's right to remain at work in a union shop *only so long as he pays his union dues,* no matter how reprehensible to the union his conduct in other respects might be.

"In this case, the Employer in each instance, when confronted by a request that gave him 'reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues . . .,'" acted at his peril. In his own interest and to save himself from validating the statute in the event that the belief engendered by the letter should turn out to be the fact, he would have been prudent to investigate. But a failure to investigate, although risky, *clearly would not entail a violation if in fact, as is the case here, nonpayment of dues alone caused the employees' loss of membership in the Union.* The statute does not penalize an employer's failure to investigate, nor does it save an employer from a violation, merely because he does investigate. Having some grounds for believing that nonpayment of dues was not the reason for an employee's loss of membership in a Union, an employer would still not be guilty of a dis-

criminatory discharge if the union's real reason for the expulsion was nonpayment of dues.

"*As for the Respondent Union, the language of Section 8(b)(2) itself precludes a finding that it violated that section.* In pertinent part, 8(b)(2) proscribes causing an employer to discriminate against an employee with respect to whom 'membership' has been denied or terminated on some ground other than his failure to tender periodic dues or initiation fees. There is no showing in this case that the *membership* of Brubaker, Brookover, or Papangellin was denied or terminated (by the Union) for any reason other than their failure to tender timely dues and initiation fees. *Whatever motivation the Union may have had for thereafter requesting their discharge is not relevant in determining whether or not it violated the Act.*

"For these reasons, Members Houston and Styles would dismiss the complaint insofar as it alleges violations with respect to Brubaker, Brookover, and Papangellin, even apart from the ground expressed in the body of this decision, as to which they concur with Member Peterson." (Emphasis supplied)

This construction of Section 8(b)(2) obviously is in accord with the plain provisions of the statute.

(2) It was the duty of the court below to review and set aside the Board's misapplication of the Statute to the conceded and undisputed facts set forth above (*NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 321, 325, 326; *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369, 370; *Brannan* v. *Stark*, 342 U.S. 451, 465-6; *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 76 S. Ct. 574, 577; *Securities & Exchange Commission* v. *Central Ill. Corp.*, 338 U.S. 96, 128-9).

But the court ignored the questionable legality of the Board's order and accepted the Board's contention that it had merely determined questions of fact, as to which its determinations were conclusive, so long as supported by substantial evidence, and that only factual questions were before the court—avoiding the obvious question of whether its findings and conclusions were within the boundaries of the Statute and whether its determinations of questions of law were supportable.

Both Congress and this Court have declared that the court reviewing an agency action has the function of determining questions: (1) of law, (2) of the interpretation and application of federal statutes; (3) of the meaning and application of the terms of an agency action; and (4) of whether an agency has exceeded its statutory limits or authority, or acted outside of its statutory authority (Section 10(e), Admin. Procedure Act, 5 U.S.C. 1009(e); *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 321, 326; *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369; *Brannan* v. *Stark*, 342 U.S. 451, 465-466; *E. Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 76 S. Ct. 574, 577). Both this Court and other courts below have declared the scope of judicial review of orders of the National Labor Relations Board issued under Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e); Appendix 27a) is the same as that established by Section 10(e) of the Admin. Proc. Act. (5 U.S.C. 1009(e); (Appendix 23a) (*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487; *NLRB* v. *Minn. Mining & Mfg. Co.*, 179 F. 2d 323, 326)

We believe the court below was remiss in exercise of its review function, in not determining the serious

questions of law, statutory interpretation and application, meaning of the agency action, and statutory limitation and authority, set forth above.

(3) Congress is ordinarily presumed to have intended the words of a statute to have their usual and ordinary meaning (2 Sutherland, Statutes and Statutory Construction, 3rd Ed., p. 437; *NLRB* v. *Coca Cola Bottling Co.,* 76 S. Ct. 383, 386; *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607, 618; *Old Colony R. Co.* v. *Comm.,* 284 U.S. 552).

In Section 8(b)(2) of the Act, Congress declared that a union violated Section 8(b)(2) of the Act only when it caused the discharge of an employee under a union-security agreement *whose union membership had been terminated for some other reason than non-payment of dues.* It is thus clear that Congress did *not* intend to invalidate discharges under a union-security agreement where it is not disputed that the union did not cause the dischargee's union membership to terminate for any reason other than non-payment of dues, however much the Board might wish it to be otherwise.

In fact, this is just the type of discharge "for cause" in which the Board is precluded from ordering reinstatement with back pay of the dischargee (Section 10(c) NLRA, 29 U.S.C. Sec. 160(c), Appendix 27a).

As Justice Reed stated in the case of *Social Security Board* v. *Nierotko,* 327 U.S. 358, at pages 369, 370:

> "Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. Congress might have declared that 'back pay'

awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid to employees by employers should be treated as wages . . . Congress did neither. An Agency may not finally decide the limits of its statutory power. That is a judicial function . . . We conclude . . . that the Board's interpretation of this Statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits . . . It is beyond the permissible limits of administrative interpretation."

In the above case, the Social Security Board had interpreted the word "wages" as used in the Social Security Act as not to include back pay awards granted by the National Labor Relations Board. The Court found as a matter of law that the Social Security Board had exceeded its statutory powers. Justice Frankfurter, in his concurring opinion, succinctly stated the rule as follows:

> "It is a plain disregard of the law for the Social Security Board not to include such payments (back pay awards) among the employees' wages. Neither the terms of the Social Security Act . . . nor the implicatons of policy . . . give the Board judicially unreviewable authority to exclude from wages *what as a matter of law are wages.*" (Emphasis supplied)

The Petitioner submits that the question of the effect to be given the language of Section 8(b)(2) is of great importance in the administration of the statute, particularly in view of its impact on union-security agreements and the provisions of union constitutions governing termination of membership; that the statutory language has been erroneously applied

in this case to achieve a purpose not contemplated by the statute; and that this is a question which has not yet been, but should be, finally resolved by this Court.

b. Section 8(b)(1)(A)

(1) The Board's General Counsel charged the Union in Paragraph 8(a) of the Complaint with having violated Section 8(b)(1)(A) of the Act (Appendix 25a) by its Steward Chmielak, in that Chmielak told undesignated Peerless employees in June, August, September and October, 1953, that the Union would not process their grievances unless they paid assessments (or donations) into the Union's Strike Fund. The Board relied on testimony by one employee, Cerminn, to the effect that, sometime in October or November, 1953, Chmielak told Cerminn he would not process Cerminn's grievances *if he didn't have a paid-up dues status in the Union* (good standing membership), to substantiate its finding of the violation of 8(b)(1)(A), as charged in Paragraph 8(a) of the Complaint.

The Board thus avoided the 10(b) limitations problem raised by the Union by this finding. (See footnote 6, R. 382, Appendix 6a).

The Union urged dismissal of this finding of violation of Section 8(b)(1)(A), however, on the ground there was a fatal varance between the conduct charged as constituting the alleged violation in Paragraph 8(a) of the Complaint and this proof advanced by the Board in support thereof, maintaining that, as a question of law, such variance was fatal to the Complaint, since the Boards General Counsel did not amend his Complaint to specify the materially different alleged October threat to be violative of Sec.

8(b)(1)(A). The lower court, however, relied on both a June 10 and the October threat to substantiate the Board's finding of violation of Sec. 8(b)(1)(A) charged in Paragraph 8(a) of the Complaint **(Appendix 17a).**

The courts charged with the review of orders of administrative agencies have consistently held a material variance between Complaint and Proof to be sufficient ground for denial of enforcement of the agency order (*NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332, 346; *NLRB* v. *Consol. Edison Co.*, 305 U.S. 197, 234, 235; *NLRB* v. *IBS Mfg. Co.*, 210 F. 2d 634, 637; *Schneiderman* v. *U. S.*, 320 U.S. 118, 159, 160; *NLRB* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149, 150; *FTC* v. *Standard Brands*, 189 F. 2d 510, 512, 513; *NLRB* v. *Fulton Bag Co.*, 175 F. 2d 675, 677). And Section 10(b) of the Act bars reliance on acts occurring more than six months prior to the charge (29 U.S.C. 160(b)).

June 10 was the only time the threat set forth in the Complaint was voiced by Chmielak; the threat voiced in October was an entirely different one. Section 10(b) precludes reliance upon the June 10 threat to establish violation of Section 8(b)(1)(A) as alleged; and the line of cases cited above preclude reliance upon the October threat to establish violation of Section 8(b)(1)(A) as alleged.

The Petitioner submits that this is an important question of law and the construction and application of Section 10(b) of the Act, which should be finally resolved by this Court.

2. Assuming arguendo that the Board and the court below might apply a "futility of tender" doctrine in this case, the application of this doctrine by the court below is believed to be in conflict with the decision of the Second Circuit in NLRB v. Department Store Union, 216 F. 2d 285.

In that case, an employee subject to a valid Union security agreement failed to pay current dues to the Union, on his self-belief the Union would refuse to accept them, because the Union had refused to accept dues tenders from him in the past, without an accompanying fine payment. The Union sought and secured his discharge. The Board held the Union's conduct violative of Section 8(b)(2) in that, had the employee tendered current dues to the Union, to retain Union membership, the Union would have refused the tender without an accompanying fine payment. The court set aside the Board's order, holding as a matter of law that, where the employee had failed to tender current dues *to test the question of whether the Union would have refused his tender unless he accompanied the dues tender with a fine payment,* the Board's speculative assumption that it would have been refused could not support its order.

In similar fashion here, the Board held the Union violated Section 8(b)(2) of the Act by causing the discharge of employees Salisbury, Picha and Bellendir for their having permitted their Union membership to terminate by non-payment of dues during a period they were subject to a valid Union security agreement, on the basis of a finding such tender would have been refused if made. Here, too, the Board held that, had these employees made a timely tender of dues to the Union to avoid such termination, it would have been refused without an accompanying donation to the Union Strike Fund. And similarly, *these*

employees failed to test this speculative assumption. In this case, however, the Circuit Court ordered enforcement of the Board order. Thus there still remains a conflict between the circuits, on the legal question of whether an employee who alleges himself to be of the opinion his tender of dues if made would be refused shall be required to test such belief before the Board may find "futility", and order reinstatement, which question should be resolved by this Court.

3. Assuming arguendo that the Board and court might apply a "futility of tender" doctrine in this case, their application of the doctrine, as a question of law, is believed to be contrary to, and in conflict with, prevailing legal authority, including that of this court.

The Board and Court relied upon the existence of an alleged Union "policy" to refuse dues tenders without an accompanying donation to the Union Strike Fund, to excuse Salisbury's non-tender of dues to the Union for the months of April, May and June, 1953. They reasoned that, had Salisbury made a tender of dues to the Union during that three-month grace period, to avoid termination of his membership, the Union would have refused it, and went on to find that this rendered such tender "futile", thus excusing him from application of the Section 8(b)(2) statutory requirement. To similar effect, Picha and Bellendir.

The Seventh Circuit, however, has itself ruled that the general law of tender should be applied to situations like these. (*NLRB* v. *Aluminum Workers*, 230 F. 2d 515, 518). And the general law of tender requires: (1) *an affirmative and timely tender* by the obligor to the obligee, and (2) *an affirmative rejection* by the obligee of such tender, before tender may be held to be futile (86 C.J.S. Tender, § 1, last paragraph;

3 Williston on Contracts, Rev. Ed., Tender, Paragraph 69(A), p. 2008; *Mobley* v. *New York Life Ins. Co.*, 295 U.S. 632; *Pfaff* v. *Petrie*, 396 Ill. 44, 56; *Supreme Tent, Knights of Maccabees* v. *Fisher*, 45 Ind. App. 419; *St. George's Society* v. *Sawyer*, 204 Ia. 103). The Second Circuit appears to follow this line of authority (*NLRB* v. *Dept. Store Union*, 216 F. 2d 285).

The Court below relied on *NLRB* v. *Int. Assn. Machinists*, 203 F. 2d 173 (Appendix 14a), as its authority. This is simply begging the question involved here, since in that case *the Union had affirmatively rejected a tender, had terminated the employee's Union membership for dual unionism, and was precluded by its own laws from accepting any dues tender from him without payment of a $500 fine.*

This case involves an entirely different question, since it is undisputed here that *the Union memberships of the involved employees were terminated for non-payment of dues by automatic application of the Union's laws.*

The fact that the Board successfully persuaded the Ninth Circuit to apply its "futility of tender" doctrine in the case relied upon by the lower court does not warrant the application to all subsequent ones, including this one, where the facts differ so materially and in view of the fact the case the Board relied upon in the Ninth Circuit (*Mayne's case*, 5 Coke 20 b), is not in line with more modern authority.

An examination and final determination of the proper application of the doctrine of "futility of tender" to 8(b)(2) cases, in the event it has any applicability under the undisputed facts of this case, should be made by this Court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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